

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

JOHN J. POST  
d/b/a SPENCER LAKE RESORT  
and MASON COUNTY,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

SHB No. 93-63

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

RECEIVED  
JUL 11 1994  
ENVIRONMENTAL  
HEARINGS OFFICE

The Shorelines Hearings Board ("Board") heard this case on March 25, 1994 at the Environmental Hearings Office, Lacey, Washington. Appellant, John Post ("Post"), represented himself. Appellant, Mason County ("County"), was represented by Michael Clift, Chief Deputy Prosecuting Attorney. Respondent, the Department of Ecology ("Ecology"), was represented by Mark Jobson, Assistant Attorney General.

The Board was comprised of: Richard C. Kelly, Presiding; Robert V. Jensen, Bobbi Krebs-McMullen, ~~James Tupper~~, Gordon Crandall, and William Pine, Members.

Randi Hamilton and Louise Becker, of Gene Barker and Associates, Inc., of Olympia, recorded the proceedings.

The Board heard sworn testimony, reviewed exhibits, and heard final argument from the parties. This matter is the request for review of a shoreline variance permit granted by

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER - 1

ATTORNEY GENERAL OF WASHINGTON  
Ecology Division  
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FAX (206) 438-7743

1 Mason County to the Appellant, John Post, and denied by the  
2 Department of Ecology. Post and the County appeal. Based  
3 thereon, the Board enters these:

4 FINDINGS OF FACT

5 I.

6 Spencer Lake in Mason County, south of State Route 3, is  
7 approximately 220 acres in size.

8 II.

9 The County, in 1975, adopted the Mason County Shoreline  
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11 regulation in 1975. The MCSMP designates the shoreline of  
12 Spencer Lake as urban-residential. Uses on the lakeshore are  
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14 III.

15 Non-water-dependent commercial development must be set back  
16 50 feet from the ordinary high water mark of urban-designated  
17 shorelines. MCSMP, ch. 7.16.040.

18 IV.

19 Post owns real property on the shoreline of Spencer Lake.  
20 His property between the shoreline and Pickering Road is used by  
21 Post for a business, known as Spencer Lake Tavern or Spencer  
22 Lake Resort. The tavern property also includes a recreational  
23 vehicle park, a septic tank, and an effluent transfer station.  
24 Opposite the tavern and R.V. park and across Pickering Road,  
25 Post owns several acres of land. On this property is Post's  
26 residence, a rental residence, and an R.V. park and recreational

1 area in development. Also located on this property is the  
2 drainfield for the effluent transfer station referred to above.

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4 Post, on May 12, 1993, applied to the County for a  
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7 increased seating. The expansion will also allow Post to  
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13 The County issued a Determination of Non-Significance  
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18 Ecology denied the variance on September 13, 1993.

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20 Post appealed the denial to this Board on October 11, 1993.  
21 The appeal was certified on November 5, 1993.

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That part of the building closest to the lake is a two-story structure. The lower level is used for storage. The upper level is part of the tavern and open to the public.

XII.

The proposed additions to the structure are within 50 feet of the ordinary high water mark. The proposed additions to the structure will cost more than \$2,500, or increase the market value of the structure by more than \$2,500.

XIII.

The proposed expansion will enlarge seating capacity from 40 to 65-80. Additional seating capacity is proposed to be located in the new additions to the tavern. Also located in the addition is an office and restroom facility. The additions total approximately 1000 square feet on the upper level. The plans submitted do not provide sufficient detail to determine the nature of use on the lower level.

XIV.

The current structure is approximately 27 feet from the property line to the east. The current structure is approximately 45 feet from the center line of Pickering Road. The current structure is approximately 41 feet 8 inches from the R.V. park on Post's adjacent property. In the space between the tavern and the R.V. park is the septic tank and effluent transfer station.

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In 1987, Post installed the septic tank and effluent transfer station pursuant to local health code and authorized by the Mason County General Services Department.

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Post's lakefront property is approximately 269 feet in length.

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Parking for the tavern is on both sides of Pickering Road. During the summer season, cars are parked along both sides of Pickering Road. The area around the tavern is used for outdoor recreation including access to the lake. Post permits the public to access the lake across his property adjacent to the tavern and to the east. Public access is by permission which may be withdrawn by the owner. At the present no fee is charged.

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The business has grown steadily since 1986.

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All other waterfront properties on this part of the lake are residential.

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There are nearby commercial uses but these are across Pickering Road to the north. These include a small grocery and video store and a gas station.

1 CONCLUSIONS OF LAW

2 I.

3 The Board has jurisdiction over the shoreline issues  
4 presented. RCW 90.58.180.

5 II.

6 The burden of proof is upon the party requesting review.  
7 RCW 90.58.140(7); WAC 461-08-170(9).

8 III.

9 No substantial development permit may be issued which is  
10 inconsistent with the provisions of the Shoreline Management Act  
11 ("SMA") and the local master program. RCW 90.58.140(2)(b).

12 IV.

13 No shoreline variance permit may be issued which does not  
14 meet the criteria set forth at WAC 173-14-150, or the MCSMP,  
15 whichever is more restrictive.

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17 Spencer Lake is a shoreline of the state. RCW  
18 90.58.030(2)(d). WAC 173-20-480. The proposed development  
19 requires a substantial development permit and a variance.

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21 The project requires a substantial development permit  
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25 Spencer Lake Tavern and Resort are water-oriented uses, not  
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The project requires a variance because it is proposed to be built within the shoreline setback for non-water-dependent commercial uses. MCSMP 7.16.040.

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Variances are designed as escape valves from imperfect land-use ordinances. 3 R. Anderson, American Law of Zoning 3d, § 19.10 (1986). This mechanism allows governmental entities to avoid applying land use restrictions which, if literally applied, would deny a property all beneficial use of the property. Id. at § 20.02.

X.

Variances are exceptions to the rule. The SMA is to be liberally construed on behalf of its purposes. RCW 90.58.900; Clam Shacks v. Skagit County, 109 Wn.2d 91, 93, 743 P.2d 265 (1987). Exceptions to its regulations must be strictly construed. See Mead School District v. Mead Education, 85 Wn.2d 140, 145, 530 P.2d 302 (1975) (holding that the liberal construction command of the Open Public Meetings Act implies an intent that the Act's exceptions be narrowly confined).

XI.

The county variance criteria, with one exception, are identical to those contained in Ecology's regulations at WAC 173-14-150. Under WAC 173-14-155, this Board applies the more restrictive criteria to the project. Strand v. Snohomish County, SHB No. 85-4 (1985).

XII.

The MCSMP contains the following variance criteria:

The purpose of a variance permit is strictly limited to granting relief to specific bulk dimensional or performance standards set forth in the master program where there are extraordinary or unique circumstances relating to the property such that the strict implementation of the master program would impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020 [emphasis added].

Variance permits for development that will be located landward of the ordinary high water mark (OHWM), except those areas designated as marshes, bogs or swamps, may be authorized provided the applicant can demonstrate all of the following:

- (1) That the strict application of the bulk dimensional or performance standards set forth in the master program precludes or significantly interferes with a reasonable use of the property not otherwise prohibited by the master program;
- (2) That the hardship which serves as a basis for the granting of the variance is specifically related to the property of the applicant and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not for example from deed restrictions or the applicant's own actions;
- (3) That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to the adjacent properties or the shoreline environment;
- (4) That the variance authorized does constitute a grant of special privilege not enjoyed by other properties in the area, and will be the minimum necessary to afford relief;
- (5) That the public interest will suffer no substantial detrimental effect.

In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if variances were granted to other



1 developments in the area where similar circumstances  
2 exist, the total of the variances should also remain  
3 consistent with the policies of RCW 90.58.020 and  
should not produce substantial adverse effects to the  
shoreline environment.

4 MCSMP, ch. 7.28.020.

5 XIII.

6 Post has not demonstrated that denial of the variance would  
7 cause him an unnecessary hardship. An applicant must show  
8 extraordinary or unique circumstances related to their property  
9 in order to qualify under the statutory and regulatory threshold  
10 of unnecessary hardship. RCW 90.58.100(5); MCSMP, ch. 7.28.020.  
11 It is not the nature of Post's property that causes the problem;  
12 rather, it is the applicant's desire to expand the commercial  
13 use within the shoreline setback when other alternatives are  
14 available.

15 XIV.

16 Post's options include: expansion to the east or west;  
17 relocation across the road; relocation to the west in place of  
18 the R.V. pads; and expanding vertically outside the setback.

19 Even if Post were able to establish extraordinary  
20 circumstances, he has not proven that his proposal satisfies  
21 Criteria No. (1) and (2) of MCSMP.

22 XV.

23 Denial of the variance does not preclude Post from making a  
24 reasonable use of the property. Post currently makes a  
25 reasonable use of the property, namely operation of a  
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1 diversified business enterprise, and can continue to do so  
2 without expansion of the business at its current location.

3 XVI.

4 The only hardship cited by Post which serves as a basis for  
5 granting the variance is not specifically related to the  
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9 Any hardship was imposed by the applicant's own actions in  
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12 building on its west side. By so doing, the applicant made it  
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14 XVIII.

15 Expansion of this commercial use within the shoreline  
16 setback is not compatible with other permitted activities in the  
17 area which are overwhelmingly residential along the shoreline of  
18 the lake. Granting of the variance would cause adverse effects  
19 to adjacent properties or the shoreline environment of the lake.

20 XIX.

21 If variances were granted to other commercial developments  
22 in Mason County on its urban shorelines where similar  
23 circumstances existed, the total of the variances would not  
24 remain consistent with the policies of RCW 90.58.020. Granting  
25 of a variance in this instance to satisfy a business need would  
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1 establish a precedent which could produce substantial adverse  
2 effects to the urban shoreline environments of Mason County.

3 XX.

4 Any Finding of Fact deemed to be a Conclusion of Law is  
5 hereby adopted as such. From the foregoing, the Board issues  
6 this:

7 ORDER


8 Ecology's denial of the shoreline variance is affirmed.

9 DATED this 27<sup>th</sup> day of July, 1994.

10 SHORELINES HEARINGS BOARD

11   
12 RICHARD C. KELLEY, Presiding

13   
14 ROBERT V. JENSEN, Chairman

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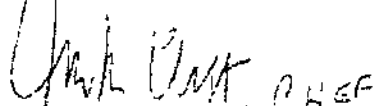
1 Presented by:

2 CHRISTINE O. GREGOIRE  
3 Attorney General

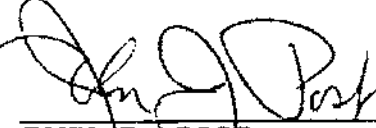
4 

5 MARK C. JOBSON, WSBA #22171  
6 Assistant Attorney General  
7 Ecology Division  
8 Attorneys for Respondent  
9 Department of Ecology

8 Approved as to form,  
9 notice of presentation  
10 waived:

11 

12 MICHAEL CLIFT WSBA #14382  
13 Mason County Deputy Prosecutor

14   
15 JOHN J. POST  
16 Appellant

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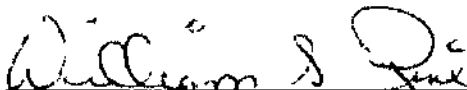
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DEPARTMENT OF ECOLOGY,

Respondent.

SHB NO. 93-63

MEMORANDUM DECISION

We conclude that the proposed commercial expansion does not meet the variance criteria of the Mason County Shoreline Master Program. Specifically:

1) The large amount of property owned by Post on both sides of the road, and the current uses of the adjacent portions of it on the waterward side of the road, give Post a number of options in expanding his business. We find that he has no "unnecessary hardship".

2) Even if Post's situation were to qualify as an unnecessary hardship, we find that his proposal does not meet the variance criteria for two reasons:

a) He already has a reasonable use of his property, namely the diversified business enterprise he currently conducts; and

b) His difficulty in expanding his tavern and food business is the direct result of the decisions he made in locating the septic tank equipment and the recreational vehicle pads adjacent to the tavern; we find that this is a hardship caused by his own actions.

3. We also find that this project was improperly approved by the County as a variance only. Because it is in excess of \$2,500, it would require a Substantial Development Permit; additionally, since a change of use and intensification of an existing use which would

1  
2 otherwise require a Conditional Use Permit is part of the proposal, a CUP would have been  
3 necessary.

4 ORDER

5 We grant Ecology's appeal, and deny the variance.

6 We retain jurisdiction for the purpose of rendering a final order.

7 DONE this 11 day of April, 1994, in Lacey, Washington.

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9 SHORELINES HEARINGS BOARD

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11 Richard C. Kelley, Presiding Member

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13 Robert V. Jensen, Chairman

14 Bobbi Krebs-McMullen, Member

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19 S93-63F